No. 94-1511

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SAMUEL LEWIS, *et al.*,
Petitioners,

v.

FLETCHER CASEY, JR., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

In their Brief, respondents set forth several arguments which are identical to arguments presented in their response to petitioners' stay application. Passage of time has not made these arguments any more persuasive than when this Court granted petitioners' stay. The conflicts in the circuits are real, and as revealed by the conflicting opinions, respondents' attempt to explain them away is unavailing. Particularly astounding is the denial of a conflict which was specifically recognized by the Ninth Circuit in this case.

It is no coincidence that eighteen states filed in petitioners' behalf. These states see both the conflict in the circuits and the district court's attempt to micromanage Arizona's prison system as a problem sufficiently serious to warrant review.

I. THE CIRCUITS CONFLICT ON PRISONER ACCESS TO THE COURTS

Regarding access for prisoners who speak English and are literate, the circuit courts conflict on whether *Bounds* requires either law libraries or legal assistance from persons trained in the law, or whether *Bounds* requires both. The majority of circuits holds that *Bounds* does not require both. See *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855 (9th Cir. 1985); *Campbell v. Miller*, 787 F.2d 217, 229-30 (7th Cir. 1986); and *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985). Other circuits have required both. See *Battle v. Anderson*, 614 F.2d 251, 255-256 (10th Cir. 1980) *Kendrick v. Bland*, 586 F. Supp. 1536, 1549 (W.D. Ky. 1984); and *Glover v. Johnson*, 478 F. Supp. 1075, 1096 (E.D.Mich. 1979). Certiorari must be granted to resolve this conflict, which the Ninth Circuit in this case specifically recognized. App. A at 14a; 43 F.3d at 1270.[1]

The circuit courts also conflict on access for illiterate inmates. *Hooks v. Wainwright*, 775 F.2d 1433, 1436-37 (11th Cir. 1985) and *Bee v. Utah State Prison*, 823 F.2d 397, 399 (10th Cir. 1987) hold that illiterate or non-English speaking inmates are not entitled to more than constitutionally adequate law libraries. *Cruz v. Hauck*, 627 F.2d 710 (5th Cir. 1980) and *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992) hold that these inmates are entitled to law-trained legal assistants in addition to libraries. Certiorari must be granted to resolve this conflict.[2]

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[1] Respondents' assertion that petitioners may hire librarians without law or paralegal degrees misstates the record. On January 14, 1994, the special master mandated that petitioners must hire *only* librarians with law or paralegal degrees.

[2] Petitioners categorically deny the unsupported assertion (at 18) that they declined an "eligibility program" for providing legal assistants only to illiterate inmates. Moreover, even if there had been such an offer, it would have been meaningless because the special master refused to cap the number of legal assistants. Petitioners would be forced to train any inmate who wanted to be a legal assistant, as long as they were otherwise qualified.

II. THE ACTUAL INJURY QUESTION MUST BE RESOLVED

This Court must decide whether the Ninth Circuit erred in placing the burden *upon petitioners* to demonstrate that their chosen methods of access were adequate. Respondents bear the burden of demonstrating actual injury, *Vandelft v. Moses*, 31 F.3d 794 (9th Cir. 1994), and they failed to come forward with such evidence.[3] Absent such evidence, respondents lack standing to bring their claim, an issue of subject matter jurisdiction that this Court must address regardless of its presentation by the parties below. *Bender v. Williamsport Area School District*, 475 U.S. 534, 542 (1986).

III. THE DISTRICT COURT'S REMEDY INAPPROPRIATELY INTRUDES ON PRISON ADMINISTRATION

Respondents' failure to even address the district court's extreme micromanagement of prison administration and its disregard for the "reasonable relation" test,[4] bespeaks the weakness of their position. No case supports the detailed injunction imposed in this case.[5] In fact, such

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[3] The district court's "finding" that two inmates suffered actual injury is flatly unsupported by the record. Petitioners stand by their recitation of the facts in their petition, which is supported by the record.

[4] allowing infringements on prisoners' constitutional interests that are reasonably related to legitimate penological interests

[5] *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991) does not support respondents' position that the injunction here is appropriate. *Gluth* involved an access question for *one* unit within the Florence facility. The *Gluth* plaintiffs' statement of facts in support of their motion for summary judgment went unopposed by the defendants. Due to the defendants' virtual default, the Ninth Circuit had no choice but to affirm the district court's order. In this case, petitioners presented *extensive* evidence that prisoners had meaningful

intrusion threatens petitioners' ability to maintain adequate security[6] and directly contravenes the principle requiring federal court deference to state prison management. *Thornburgh v. Abbott*, 490 U.S. 401, 407-408 (1989); *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 764 (1992). The injunction far exceeds the constitutionally-required minimum standards for prisoner access and violates the separation of powers.

CONCLUSION

Respondents' current opposition merely parrots the unsuccessful arguments they made in response to petitioners' stay application. Their arguments are no more persuasive now. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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access to the courts. The district court ignored this evidence and issued an injunction virtually identical to *Gluth*, to be applied to all other units within petitioners' prison system. Moreover, petitioners' opportunity to "object" in this case was virtually meaningless; they had no opportunity to object to the systemwide application of the *Gluth* plan.

[6] For example, respondents' assertion (at 33) that petitioners have the option to limit the libraries' hours to only 50 per week is ludicrous. The 50 hour limit applies only to minimum security units; petitioners would have to make every unit a minimum security unit in order to exercise this "option."